IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9482 of 2007
To
SPECIAL CIVIL APPLICATION No. 9492 of 2007
With
SPECIAL CIVIL APPLICATION No. 11043 of 1994
With
SPECIAL CIVIL APPLICATION No. 26106 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge ?

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SAIYED SAJJADALI ASHRAFALI C/O. SAGAR GRANITE - Petitioner(s)
Versus
STATE OF GUJARAT THRO' THE SECRETARY & 13 - Respondent(s)

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Appearance :

SPECIAL CIVIL APPLICATION Nos. 9482 TO 9494 of 2007
MS SONAL R SHAH for Petitioner(s) : 1 - 11.
MR UDAY R BHATT, AGP for Respondent(s) : 1-2,
NOTICE SERVED BY DS for Respondent(s) : 3.
MR MTM HAKIM for Respondent(s) : 4,
Ms KJ BRAHMBHATT for Respondent(s) : 5.

SPECIAL CIVIL APPLICATION No. 11043 of 1994
MR ASHISH B DESAI for Petitioner(s) : 1 - 12.
MR UDAY R BHATT, AGP for Respondent(s) : 1-2,
Respondent(s) : 3 DELETED.
MR RR MARSHALL for Respondent(s) : 4,

SPECIAL CIVIL APPLICATION No. 26106 OF 2006
MR MTM HAKIM for Petitioner(s) : 1.
MR UDAY R BHATT, AGP for Respondent(s) : 1-3,
NOTICE SERVED BY DS Respondent(s) : 1- 16, 18 – 44, 46 – 62,
MR NILESH PANDYA for for Respondent(s) : 4 – 21, 23 – 44, 46 – 62.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 11/10/2007
COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

In the petitions filed in the year 2007, eleven petitioners are challenging the notices dated 12.3.2007 issued by the City Survey Superintendent, Baroda for removal of the encroachment under Section 61 of the Bombay Land Revenue Code, 1879 (hereinafter referred to as "the BLR Code") as authorized by the Collector, Baroda. The notices are issued under Section 202 of the BLR Code for eviction of the petitioners on the ground that the they are wrongfully in possession of the land in question being the land in City Survey No. 5047 Paiki (Revenue Survey Nos. 692 and 754) on the Bahuchraji Road, Baroda.

2. There is no dispute about the fact that the land in question is being used as kabrastan or graveyard for the last several decades. The petitioners claim to have obtained small parcels of land out of the aforesaid survey numbers on lease from Shaikh Hydermiyan Sikandarmiyan (original respondent No.3) who died during pendency of the petition and is shown to be represented by his son Ibrahimbhai Hudermiyan in the capacity of Manager of Matariya Kabrastan. The widow of Hydermiyan has thereafter come forward and has been joined as the manager of Matariya Kabrastan and has also filed the affidavit dated 10.10.2007.

3. The petitioners are running their business in the premises constructed on the land purportedly let out by Hydermiyan in favour of the petitioners in the year 1987 or thereafter. According to the petitioners, they are lawful occupants on the land in question and the City Survey Superintendent has no legal authority to evict the petitioners from the land belonging to respondent Nos. 3 and 5.

It is also contended by the petitioners that the dispute about the ownership rights of Shaikh Hydermiyan Sikandarmiyan (now deceased and, therefore, of his widow) is pending before the Collector under Section 37(2) of the BLR Code and, therefore, till the said dispute is decided by the Collector, the petitioners cannot be evicted from the land in question. Reliance is placed on the decision in 1990 (2) GLR 1161.

4. It is the case of the State Government, Collector, Baroda and City Survey Superintendent, Baroda that the land bearing Survey Nos. 692 and 754 belongs to the State Government and the revenue record for the year 1914 onwards clearly shows that the land belongs to the Government (sarkari) and that the land is for kabrastan. After referring to the revenue records for the years 1944, 1942-42, 1951-52 and 12.10.1954 and the revenue records for the years 1971 - 1984 etc, it is stated that the land belongs to the Government and is used for the public purpose of kabrastan. It is also stated that on 26.12.1973, the Charity Commissioner had rejected an application filed by one Umravbibi Sikandarsha to register a trust on the property bearing Survey Nos. 692 and 754.

It appears that on 27.1.1984, the Deputy Collector, Baroda passed an order in which, after clearly stating that the land was of sarvajanik kabrastan (public graveyard – place of burial for local residents), Hydermiyan and his forefathers were offering flowers to the tombs and as they were having rights of Divabatti, to look after the kabrastan, the Deputy Collector observed that it would be proper if the name of Hydermiyan is shown in the column of “other rights”. However, while expressly rejecting the claim of Hydermiyan for being shown as the owner of the land in question, the Deputy Collector directed that in the column of “occupant/owner”, “Sarvajanik Kabrastan” be mentioned in place of “Government”.

The Collector, Baroda took the above order of the Deputy Collector in suo motu revision and by order dated 7.8.1993 cancelled the Deputy Collector's order dated 27.1.1984 and directed that “the Government” be shown as the owner of the land. The Collector also directed initiation of proceedings for removal of unauthroized construction on the land. Against the above order, Hydermiyan filed revision application before the State Government i.e before the Additional Chief Secretary (Appeals), Revenue Department who dismissed the revision application by order dated 16.6.1998. In the said order, the Additional Chief Secretary also observed that it was open to the revision petitioner to move the competent authority for inquiry under Section 37(2) of the BLR Code.

6. Aggrieved by the above order, Hydermiyan filed Special Civil Application No. 8536 of 1998 which was withdrawn on 20.12.1999 after the learned Single Judge of this Court made the following observations :-

> “Learned Advocate Ms. Kalpana J. Brahmbhatt seeks permission to withdraw this petition so as to enable the petitioners to approach the concerned authority for filing an application under the provisions of Section 37(2) of the Bombay Land Revenue Code. The only apprehension which the petitioners are having at this stage is that they might be evicted from the land in question by the Govt. authorities without following the due process of law.
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> I do not think that the Govt. authorities will evict the petitioners without following the due process of law. If the petitioners are to be evicted from the land in question, I am sure that necessary formalities under the provisions of the Bombay Land Revenue Code shall be followed by the concerned authorities.
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> So as to enable the petitioners to approach the concerned authority under the Bombay Land Revenue Code, the petition is permitted to be withdrawn.
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> Notice is discharged.”

It appears that when the above order was passed, none represented respondent Nos. 1 and 2 in the said petition. Respondent No.1 was Additional Chief Secretary (Appeals) and respondent No.2 was the Collector, Baroda.

7. It appears that in the meantime, when pursuant to his order dated 7.8.1993 the Collector initiated action for evicting the persons who had entered the land in question and claimed to be tenants of Hydermiyan, Special Civil Application Nos. 11007, 11043 and 11150 of 1994 came to be filed praying for injunction against the Collector from evicting the petitioners. On account of the ad-interim injunction in the said petitions, those petitioners continued their occupation of the constructions put up by them on the land obtained by them through the purported lease executed by Hydermiyan. When Special Civil Application No. 11150 of 1994 came up for hearing before a leaned Single Judge of this Court on 5.10.2005, the petition was permitted to be withdrawn with liberty to make a representation to the Collector, Baroda and with an observation that the petitioners may not be evicted except by due process of law.

Since the petitioners therein did not make any application or representation within the one month limit stipulated in the above order of the learned Single Judge, the Collector instructed the City Survey Superintendent, Baroda to remove the encroachment by following the procedure under sections 61 and 2002 of the BLR Code. The City Survey Superintendent thereupon issued notices to the encroachers to remove their unauthorised construction. Against such notices issued on 7.8.2006, some of the petitioners filed Regular Civil Suit No. 702 of 2006 to permanently restrain the Collector from disturbing their possession till the proceedings under Section 37(2) are decided. The City Survey Superintendent again issued notices on 14th and 15th March, 2007 calling upon the

petitioners to remove the encroachments. Hence, Special Civil Application Nos. 9482 to 9292 of 2007 have been filed for challenging the said notices.

8. In the meantime, on 7.12.2006, Special Civil Application No. 26106 of 2006 came to be filed by the In-charge Secretary, Matariya Kabrastan & Tahaffuz Committee making a grievance against non-removal of encroachments by the Collector and the City Survey Superintendent from the land which was being used from the time immemorial only for the purpose of kabrastan. It was also prayed in the said petition that filing of Regular Civil Suit No. 702 of 2006 by the encroachers was a gross abuse and misuse of the process of law and, therefore, the said proceedings could not be allowed to be proceeded with.

9. Affidavit in reply has been filed by respondent No. 3 – City Survey Superintendent, Baroda giving a detailed chronological history from 1914 onwards and pointing out that all along the land has always been shown in the revenue record as Government land being used as public kabrastan. It is also contended that Hydermiyan had no right, title or interest in the land in question and, therefore, the petitioners claiming to have obtained leasehold rights in the land in question had no lawful title and the petitioners were encroachers who are required to be removed. It is also pointed out in the reply affidavit that the Government land is being used for kabrastan and because of unauthroised encroachment by the petitioners, the residents of the locality are facing great difficulty as no other place is available for burial of dead bodies. Hence, the encroachment is required to be removed immediately.

10. On the other hand, affidavit in reply has also been filed by the widow of Hydermiyan, who has been joined as respondent No.5 at her request, contending that the application filed by Hydermiyan on 18.10.1999 under Section 37(2) of the BLR Code is still pending

before the Collector, Baroda; that during pendency of the aid application, Hydermiyan expired on 27.5.2004 and, therefore, the widow gave application dated 14.2.2006 for joining her as an heir of the deceased. It is, therefore, contended that during pendency of the said application under Section 37(2) of the BLR Code, the Collector or the City Survey Superintendent could not have issued any eviction notices to the petitioners inducted by her deceased husband Hydermiyan as tenants on different portions of the land in question. Reliance is placed on the order dated 27.1.1984 of the Deputy Collector and also the order dated 16.6.1998 of the Additional Chief Secretary (Appeals) wherein liberty is reserved for making an application for inquiry under Section 37(2) of the BLR Code.

11. Ms Sonal R Shah and Mr Ashish Desai for the petitioners, Ms Kalpana J Brahmbhatt for respondent No. 5 – widow of Hydermiyan, Mr UR Bhatt, learned AGP for the State Government, Collector, Baroda and City Survey Superintendent, Baroda, Mr RR Marshall for the Kabrastan Committee and Mr Mohd. Saif Hakim for the respondents supporting the Kabrastan Committee have made submissions for their respective clients on the basis of the respective pleadings.

12. Ms Sonal R Shah and Mr Ashish Desai for the petitioners have submitted that the petitioners were inducted as tenants of Hydermiyan, who was administrate care taker of the land in question and, therefore, the petitioners bona fide believed that Hydermiyan had the legal authority to let out the parcels of land. The petitioners put up construction on the said land and have been carrying on their business in the said premises for the last about 30 to 35 years. It is further submitted that when the Deputy Collector in his order passed on 27.1.1984 and the Additional Chief Secretary (Appeals) in his order dated 16.6.1998 expressly reserved liberty to Hydermiyan to file an application under Section 37(2) of the BLR

Code and when such an application was already filed in the year 1999 and is still pending and the widow of Hydermiyan is now prosecuting that application, the petitioners cannot be evicted till conclusion of the said inquiry. It is submitted that ultimately if it is held in the said inquiry that Hydermiyan and after his death his widow are the owners of the land in question, the lease granted by Hydermiyan in favour of the petitioners will certainly be a valid lease and that before waiting for such a decision, if the construction put up by the petitioners is demolished, the petitioners will suffer irreparable loss and injury.

13. Ms Kalpana Brahmbhatt, learned counsel for respondent No. 5 – widow of Hydermiyan, has supported the petitioners and submitted that the entire matter about ownership over the land in question is at large before the Collector in the inquiry under Section 37(2) of the BLR Code and, therefore, the petitioners should not be evicted till the conclusion of such inquiry.

14. On the other hand, Mr UR Bhatt, learned AGP for the authorities, Mr RR Marshall for the Matariya Kabrastan Committee and Mr Hakim for the persons supporting the Committee have submitted that in the Government record for the last almost 100 years, the land is shown as Government land being used for public kabrastan and that, therefore, as per the settled legal position such land can never be treated as private property of any individual. It is submitted that even in the Deputy Collector's order dated 27.1.1984, Hydermiyan was show to have only “divabatti” rights and he was only to look after the graveyard, but no ownership right nor even alleged possession over the land in question was recognized as far as Hydermiyan was concerned. It is also submitted that the alleged reference to the inquiry under Section 37(2) of the BLR Code in the Collector's order dated 21.7.1984 and in the order dated 16.6.1998 of the the Additional Chief Secretary was only for considering whether the land should be treated as

Government land to be used for public kabrastan or whether it should be treated as land belonging to public kabrastan. It is, therefore, submitted that the so called claim of Hydermiyan or his widow or son over the land bearing land Revenue Survey Nos. 692 and 754 in City Survey No. 5047 Paiki in Baroda was never contemplated either by the Collector or Additional Chief Secretary (Appeals) or any other authority at any point of time as worthy of consideration in any inquiry under Section 37(2) of the BLR Code. It is, therefore, vehemently submitted that there is no inquiry under Section 37)2) of the BLR Code as regards the claim of ownership by any individual as such.

Strong reliance has been placed on the decisions in AIR 1930 Oudh 245, AIR 1931 Oudh 45, AIR 1931 Oudh 203, AIR 1932 Lahore 394(1), AIR 1934 Allahabad 335AIR 1935 Oudh 47, AIR 1936 PC 83, AIR 1940 Lahore 119, AIR 1950 Nagpur 38, AIR 1964 MP 227 and the decision of this Court in Miya Mohamed Abdulkarim Jariwala vs. Collector of Surat, 1977 GLR 488 in support of the contention that if a Government land or any other land is used for a long period as a graveyard, the land can only be used as a graveyard and such land can neither be alienated nor can it be treated to be capable of any private ownership.

15. Having heard the learned counsel for the parties, we find considerable substance in the submission made by the learned AGP and the learned counsel for the Matariya Kabrastan Committee and the respondents supporting the Committee that the land is being used as a public kabrastan for the last almost 100 years. Neither the petitioners nor the heirs of Hydermiyan have been able to show any document whatsoever indicating even a tilt of title over the land bearing revenue survey Nos. 692 and 754 - City Survey No. 5047 Paiki in Baroda which is being used as public kabrastan for the last almost 100 years. As per the settled legal position, the land remains a public graveyard and cannot be used for any other

purpose. The owner of such land – either the Government or any other body managing such kabrastan can alienate such land either way of sale or lease or in any other manner. Admittedly, the petitioners have not been granted any such lease by the Government. The only claim that the petitioners have put up is the purported lease granted by Hydermiyan in their favour by lease deeds executed in the years 1987 onwards. Such documents cannot confer any valid title on the petitioners, not even a right of possession in any portion of the land in question. The petitioners' occupation of such land must, therefore, be held to be illegal and they have to be treated as encroachers.

16. As regards the contention that the inquiry under Section 37(2) of the BLR Code is still pending and, therefore, the powers under Sections 61 and 202 cannot be invoked, we do not find any force in the said submission. It is only when there is a reasonable or legitimate doubt about ownership of any land that the question of inquiry under Section 37(2) of the BLR Code can possibly arise. In view the material on record including the revenue records wherein the land has always been shown as land being used for public kabrastan for the last almost 100 years, we have no manner of doubt in coming to the conclusion that the land is a public graveyard and can be used only for this purpose. If at all any application was made by Hydermiyan and is being allegedly pursued by his widow, raising any claim, it could only be regarding the scope of the limited right which Hydermiyan had being divabatti right. Neither Hydermiyan nor any of his heirs ever had any ownership right over the land in question and certainly not any right to let out any part of the land to any person nor any right to allow any person to use the land in question except for the purposes of burial of dead.

17. The learned counsel for the petitioners have relied on the decision of this Court in Aher Naran Vijanand vs. State of Gujarat,

1990 (2) GLR 1161 in support of the contention that the proceedings for eviction under Section 61 of the BLR Code can be taken, but where a citizen claims title in himself, before evicting him, inquiry under Section 37(2) must be held.

The decision is not applicable to the facts of the present case because in the facts of that case, the Court was of the view that the case put up by the petitioner about his ownership over the land in question was required to be decided and that such a dispute had to be resolved not in proceedings under Section 61, but in proceedings under Section 37(2) of the BLR Code.

As already found hereinabove, the land which is the subject matter of the controversy in the present petitions is admittedly being used as a public kabrastan for the last almost 100 years and even in the revenue records, the land is shown as the Government land being used as public kabrastan. There is no scope whatsoever for entertaining any reasonable or legitimate doubt about title to the land in question as to whether any individual like Hydermiyan or any person claiming through him has any private ownership right over the land in question. The decision cannot, therefore, apply in the instant case.

18. In view of the above discussion -

(A) Special Civil Application Nos. 9482 to 9492 of 2007 are required to be dismissed and are hereby dismissed. Notice is discharged in each petition. So also Special Civil Application No. 11043 of 1994 is dismissed. Rule is discharged.

(B) We make it clear that in view of our finding that the land is being used as a public graveyard, there is no question of any inquiry under Section 37(2) of the Bombay Land Revenue Code about any alleged private rights over the said land and, therefore, the Civil Court at Baroda shall not pass any order

or continue any order without taking into consideration the findings given and the observations made in this judgment.

(C) The respondent - authorities, particularly the Collector, Baroda and City Survey Superintendent, Baroda, shall take necessary action to remove the encroachments on the land bearing Revenue Survey Nos. 692 and 754 in City Survey No. 5047 Paiki in Baroda and remove all the unauthorised constructions put up by the encroachers, by 31st December 2007, but in any case not before 30th November, 2007. It is directed that the petitioners shall not part with possession of the property in favour of any other person or create any encumbrance.

(D) Subject to the above directions, the ad-interim relief granted earlier stands vacated.

(E) Special Civil Application No. 26106 of 2006 is disposed of in the above terms.

[M.S. SHAH, J.]

[K.A. PUJ, J.]

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